~~1246~~ No. 3426 1247

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

IN ADMIRALTY /

HIND, ROLPH & COMPANY (a copartnership), and 1,727,783 feet of lumber loaded on board the schooner "LEVI W. OSTRANDER", and FIDELITY DEPOSIT COMPANY OF MARYLAND (a corporation),

Appellants and Cross-Appellees,

vs.

H. F. OSTRANDER,

Appellee and Cross-Appellant.

BRIEF FOR APPELLANTS.

ANDROS & HENGSTLER,
LOUIS T. HENGSTLER,
Proctors for Appellants.

Index

No. 3426

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

IN ADMIRALTY

HIND, ROLPH & COMPANY (a copartnership), and 1,727,783 feet of lumber loaded on board the schooner "LEVI W. OSTRANDER", and FIDELITY DEPOSIT COMPANY OF MARYLAND (a corporation),

Appellants and Cross-Appellees,

vs.

H. F. OSTRANDER,

Appellee and Cross-Appellant.

BRIEF FOR APPELLANTS.

I. Statement of the Case.

A. OUTLINE OF CONTROLLING FACTS.

On May 15, 1917, appellee, of Seattle, as owner, made a contract of charter-party with appellants, of San Francisco, as charterers, chartering a schooner "now building at Seaborn Yards, Tacoma", for a voy-

age from Puget Sound to South Africa with a cargo of sawn lumber. The shipyard mentioned was owned by appellee, and the schooner, when completed, was named the "Levi W. Ostrander". On July 2nd, while the schooner was still in course of construction, appellants designated Mukilteo and Port Angeles as loading ports. On August 13th appellee wired to appellant: "Schooner will be ready for cargo by August 25th". On October 12th her master took charge of the newly built schooner (69),* and on October 13th she left Seaborn Yards, in tow of a tug, and proceeded to her loading place, at the wharf of the Puget Sound Mills and Timber Company at Port Angeles, where she arrived on Sunday, October 14th (53).

On October 15, 1917, the master of the schooner gave notice to the mill that his vessel was ready to load (54); and delivered simultaneously a surveyor's certificate intended to meet the requirement of the charter-party, "vessel to furnish a certificate from a Marine Surveyor of the San Francisco Board of Underwriters that she is in proper condition for the voyage" (13). We shall show hereafter that this certificate did not comply with the terms of the charter-party.

The charter-party contained no clause fixing the beginning of, or number of days allowed for loading, the printed provisions of article H, therein, ordinarily serving such a purpose, being expressly struck out.

On October 18th loading commenced. The full cargo consisted of 1,750,000 feet. On October 18th there was

*Numbers in parenthesis refer to pages of Apostles.

about 450,000 feet ready on the dock, and on October 31st the schooner had 747,203 feet on board. The schooner was completely loaded on November 24th. During the loading the work of procuring and sawing the timber, and loading the sawn lumber, was hindered and delayed by the effect of an historical general labor strike on Puget Sound and the Northwest, as a result of which the logging camps and the loading mills at Port Angeles were entirely closed down from July 16th to September 6th (203), and the mill of the Puget Sound Mills and Timber Company was left in a crippled condition for the remainder of the year 1917 (184). The evidence shows that the mill used every reasonable endeavor to dispatch the loading under the abnormal circumstances between October 18th and November 24th.

After the loading of the schooner the vessel was detained by appellee on account of the refusal of appellants to pay a demurrage bill presented to them by appellee (Libel, Art. V., Ap. p. 8). On November 30, 1917, appellee filed the libel for demurrage in the present action and attached the cargo of the schooner. This caused a further delay of the schooner. Appellant promptly filed a bond to secure the release of the cargo. Partly for appellee's own reasons and convenience, and partly by the action of the United States Government, the schooner was thereafter detained until December 26, 1917, when she sailed from Port Angeles.

The above transactions were incidental to the performance, by appellants, of a contract for the sale of the cargo of the "Levi W. Ostrander", to buyers in South Africa.

To perform this contract appellants had in turn contracted for the purchase of said cargo from Douglas Fir Exploitation and Export Company, a corporation, whose stockholders are various mills in the States of Oregon and Washington, including the Puget Sound Mills and Timber Company (418-420). In its contract with appellants it was agreed by Douglas Fir Exploitation and Export Company that the cargo of the "Levi W. Ostrander" should be delivered by the latter alongside on wharf within reach of ship's tackle.

The Douglas Fir Exploitation and Export Company, in its turn, assigned the order for the supplying of this cargo to the Charles Nelson Company, which controls the Puget Sound Mills and Timber Company (202), one of the constituent members of Douglas Fir Exploitation and Export Company (419), and both appellants and appellee consented to the assignment of Puget Sound Mills and Timber Company, at Port Angeles, as the mill by which the full cargo of the vessel should be furnished, and at whose wharf it should be delivered to the vessel.

B. QUESTIONS INVOLVED.

(1) In his libel appellee contended for demurrage during three periods:

First:	From August 25th to October 13th,	49 days	
Second:	From October 13th to November 24th,	27 days	(after deducting 13 laydays)
Third:	After November 24th,	5 days	
Total:		81 days	at $250.00 per day —$20,250.00.

(2) The District Court rendered a decree as follows:

• *First:* Denying demurrage from August 25th to October 13th.

Second: Awarding demurrage from October 15th to December 14th, less fourteen laydays not including Sundays, making 45 days demurrage at $250.00 per day, $11,250.00.

(3) Appellants appeal from that part of the decree only, which awards demurrage for *forty-five* days.

C. SPECIFICATIONS OF ERRORS RELIED UPON.

Appellant relies for a reversal of the decree of the District Court upon all the errors specified in the assignment of errors (451-456), which are, for the sake of convenience, treated in this brief under the following headings:

First: Appellee is not entitled to any demurrage for the period from October 15th to November 24th, during which the schooner was engaged in loading at Port Angeles.

Second: Appellee is not entitled to any demurrage for any period after November 24th, when the schooner had completed her loading.

II. Brief of the Argument.

FIRST: BURDEN OF PROOF IS UPON LIBELANT—APPELLEE TO SHOW NEGLIGENCE ON THE PART OF APPELLANTS IN LOADING THE CHARTERED VESSEL.

The usual provision of the printed charter fixing the beginning of loading, and the number of days allowed for the loading, is expressly struck out of this charter-party (Defendant's Exhibit C). In view of the fact, that, at the time when the contract was made, the vessel was unbuilt; that the country had recently entered into the world-war; that difficulties and obstacles could be reasonably foreseen, by both parties, both in the business of building ships for private purposes, and the business of exporting lumber for commercial gain, it was but natural that neither the builder of the future ship nor the furnishers of the future cargo should be willing to bind themselves to any fixed dates when the vessel should be delivered to the charterer and the charterer should be ready to load the cargo.

Under such circumstances, it is the law that the charterer is liable only for unnecessary or unreasonable delay in the loading of the ship, and the owner

assumes the burden of proof to show that the charterer was negligent in the loading of the chartered vessel.

Williscroft v. Cargo of the "Cyrenian", 123 Fed. 169.

Liability of the charterer to that extent was contemplated by the parties to this contract when it was made, just as they then contemplated a corresponding liability of the owner of the ship, had he, making allowances for the unusual circumstances prevailing at the time when the contract was made and when it was executed, been remiss in his duty to tender the vessel for loading within a reasonable time.

SECOND: APPELLEE IS NOT ENTITLED TO ANY DEMURRAGE FOR THE PERIOD FROM OCTOBER 15th TO NOVEMBER 24th, DURING WHICH THE SCHOONER WAS ENGAGED IN LOADING AT PORT ANGELES.

I. NEITHER BEGINNING OF LAYDAYS NOR DEMURRAGE WERE FIXED BY THE CHARTER-PARTY, AND APPELLANTS PERFORMED ALL THEIR OBLIGATIONS AS TO LOADING.

On Sunday, October 14, 1917, the schooner arrived at the loading mill at Port Angeles.

On Monday, October 15, 1917, her master delivered to the mill a notice that the vessel was then ready to load.

A. The District Court erred in holding that demurrage days began on October 15th.

The District Court, in its decree, awarded demurrage to appellee for the period beginning with October

15, 1917; "awarding to the libelant demurrage for the period between October 15, 1917, and December 14, 1917, less fourteen loading days, but not including Sundays (Decree 447).

This is clearly an error for this reason:

Assuming, for the sake of argument only, that the vessel was ready on October 15th, and that appellee had complied with all other conditions on that day, it would nevertheless be error to count the demurrage days as running from October 15th, and to award demurrage for a period beginning on that day.

B. On the erroneous assumption that the beginning of demurrage days was on October 15th, the District Court committed another error in calculating the number of demurrage days.

The error of setting the beginning of demurrage days as of October 15th, is not cured by deducting "fourteen loading days, but not including Sundays", from the assumed period of demurrage days. The decree defines the period of demurrage as *"the period between October 15, 1917, and December 14, 1917, less fourteen loading days, not including Sundays"* (447). Excluding October 15th and December 14th, this period embraces fifty-nine running days; deducting therefrom the seven Sundays within this period, leaves fifty-two days, and deducting again fourteen days allowed by the court for loading, leaves *thirty-eight* days demurrage. Both October 15th and December 14th must be excluded (*Merritt v. Ona,* 44 Fed. 369). If allowance is made for Saturday afternoons as

half holidays, there would be a further deduction of 3½ days. It appears, therefore, by mathematical demonstration, that the lower court, after setting erroneous limits to the alleged demurrage period, committed another error in its calculation of the number of days in favor of appellee, by at least seven, and possibly ten and one-half days. This excess above what the court intended to award involves an excess of $1750 or $2625 respectively, in the amount of the decree.

C. Laydays did not begin as early as October 15th, vessel not being physically ready to load until October 18th.

1. Appellee insructed his master not to begin loading until October 18.

Appellant cannot be charged with laydays before October 18th, because the master of the vessel was instructed by appellee not to load before that day.

On October 16th the mill delivered a letter to the captain, saying:

> "It is agreeable with us you commence loading now or any time your vessel is ready to receive cargo" (Respondent's Exhibit A-5).

The captain replied the same day:

> "In answer to your letter of even date I wish to state that I have *orders* from the owners in Seattle *to await instructions before commencing to load*" (Respondent's Exhibit A-16).

On October 16th, at 2:22 P. M., appellee telegraphed to his captain:

> "Please notify the mill that you *will now* receive cargo as offered" (Respondent's Exhibit A-3).

On the same day, at 6:05 P. M., appellee wired again to his captain:

> "Further to my wire this date, if notice not already given, deliver to mill as requested."

Thereupon, on October 17th or 18th (Respondent's Exhibit A-8), the captain delivered to the mill company a letter as follows:

> "This is to notify you that the Schooner 'Levi W. Ostrander' *will be* ready to receive cargo today at 1 P. M. I also agree under existing conditions to sign a demurrage release to your mill upon completion of cargo" (Respondent's Exhibit A-7).

In the forenoon of October 18th the captain wrote to his owner:

> "According to instructions in your telegram received last night, I again tendered a notice to the Puget Sound Mills and Timber Co. stating that the Schooner 'Levi W. Ostrander' was ready to receive lumber, and that upon completion of cargo I would sign a demurrage release for account of the mill under existing conditions. They accepted the notice and agreed to commence loading at 1:00 P. M. today. Mr. Ryan informed me later that *he had orders from you not to start loading* until further orders; so we are *therefore* at a standstill yet" (Respondent's Exhibit B).

After appellee had received his captain's letter, he wired, at 10:25 A. M. on October 18th:

> "* * * it is *now* in order to begin loading" (Respondent's Exhibit A-10).

These facts are common ground between the parties hereto. It follows that—assuming that appellee has any claim for demurrage in this case, which is denied—

the failure to commence loading before October 18th, at 1:00 P. M., was due to appellee's orders to his captain. Laydays could not, therefore, commence to count before the day and hour last mentioned.

2. Appellants' legal obligation to begin loading did not mature before October 18th.

a. *Because no proper Surveyor's Certificate was tendered by appellee.*

The vessel was not *"ready to load"*, under the charter-party, on October 15th. Assuming that she was then in fact physically tight, staunch, strong, and in every way fitted and provided for the intended voyage, there remained another condition precedent to the loading unfulfilled, viz., the charter-party condition that appellee was to furnish "a certificate from a Marine Surveyor of the San Francisco Board of Underwriters that she *is* in proper condition for the voyage" (Clause J Ap. 13). The vessel had just been completed; the charterer could not be expected to begin to load a valuable cargo for the long voyage from Puget Sound to South Africa on a new and untried vessel, nor could he obtain insurance on his cargo, without a preliminary and thorough survey by the representative of the underwriters showing that the new schooner was seaworthy on October 15th, when she reported her readiness to receive the cargo.

In the case of *J. J. Moore & Co. v. Cornwall,* 144 Fed. 22, this court decided that such a charter-party provision contemplates "an actual survey and inspection of the vessel" (30)

The survey certificate must show that, when tendered to charterer for the voyage at the loading place, "she *is* in proper condition *for the voyage*". It was not sufficient to show that she was seaworthy at some other time (August or September), and some other place (Seaborn Yards at Tacoma). Before appellants could be required to begin to deliver the cargo to the vessel at Port Angeles, it was the duty of appellee to satisfy appellants, in the manner agreed upon by clause J, that she was in proper condition *then,* when tendered for loading, and *there,* at the agreed loading place.

Now on October 15, 1917, the master handed to the loading mill a surveyor's certificate; but the certificate so presented was not of the kind required by the charter-party, inasmuch as it did not show that the vessel, when tendered as *ready* for loading, *was then in fact,* "in proper condition for the voyage", which means that she was *then* "in every way fitted and provided for such a voyage" (Charter-party, Clause A). It appears without controversy that Captain Gibbs, the Marine Surveyor, did *not* survey the schooner after her arrival at the loading place (395); that, in fact, he had not seen her for two months, since the month of August, when he examined her at the Seaborn Yards where she was built. It also appears that, after Captain Gibbs' survey, the windlass on the new boat had proved defective and had to be thereafter repaired (159); also that various other work was done on the vessel in anticipation of her voyage. As far as the evidence shows, this actual unseaworthiness of the vessel may have continued until the first part of October

(160); at any rate there was no survey between the dates of the admitted repairs and the 18th of October.

The surveyor's certificate does not show what was the condition of the vessel on the day when it was tendered to charterer; it does not show that the "Levi W. Ostrander" *was,* on *October 15th,* ready to receive her cargo, or "in proper condition for the voyage".

No duty of the charterer to load the vessel matured until the following conditions were complied with:

(1) That she was in fact seaworthy at Port Angeles;

(2) That she was surveyed at Port Angeles by a Marine Surveyor of the San Francisco Board of Underwriters;

(3) That the surveyor had issued a certificate showing that she was then seaworthy;

(4) That appellee had furnished such a certificate to appellants.

Then, *and only* then, was it agreed that charterer "doth engage to furnish to said vessel * * * a full cargo of sawn lumber". It is proved that conditions (2), (3) and (4) were *not* complied with. Appellants were, therefore, under no legal obligation to begin loading even on October 15th and cannot be charged with laydays starting as of that day.

b. *Because appellant had a contingent right to cancel the charter up to and including October 18th.*

Appellant cannot be charged with laydays before the proper certificate of the Marine Surveyor was furnished by the vessel, for another reason:

Clause J of the charter-party conveys to the charterer a valuable *option,* becoming effective in case this new vessel should fail to pass a satisfactory survey and be detained more than ten days for repairs, viz., the option to cancel the charter in such an event (13). The owner could not deprive the charterer of this agreed option by simply failing to furnish the required certificate. The charterer had a contingent right of cancellation, and therefore the absolute right to be furnished with the certificate. Assuming that the schooner was physically seaworthy and ready to load on October 15th, still the charterer was not bound to load *until he had received the proof, stipulated by the parties,* of the newly built schooner's suitability to receive a cargo of lumber to be carried to South Africa from Port Angeles. In fact, he never did receive this proof.

Recapitulation: Appellants are not to be charged with laydays as commencing *before* October 18th, at 1:00 P. M. for the reasons mentioned, viz.:

(a) That appellee ordered his captain not to load before that date.

(b) That no certificate of survey was given before that date.

(c) That proper notice of readiness can be given only after the vessel *is* ready; a notice that she *will be* ready at a later time specified is not a proper notice.

D. Appellants are not chargeable with laydays as from October 18th.

1. Special agreement between the mill and the captain.

Actual loading began on *October 18th, at 1 P .M.*

The condition precedent that appellee furnish the agreed Certificate of seaworthiness was operative until October 18th in favor of appellants; but it is admitted that the furnishing of the cargo and beginning of the loading constitute a waiver of this condition. Nevertheless, the appellants are not to be charged with laydays as commencing *on* October 18th, for the reasons now to be discussed. The first of these reasons is that the parties made a special agreement to that effect. The mill notified appellee, before the actual loading commenced, that it could not, under prevailing circumstances, agree to deliver cargo to the vessel "as fast as vessel can receive it". The mill, under the charter-party, had a right to take this position.

On October 15, 1917, Puget Sound Mill and Timber Company notified the captain of the vessel, after receiving his notice, by letter, that

> "we will not accept any notice at any time in regard to the commencement of laydays. We wish to advise you that we have had a strike at our plant which stopped operations in our sawmill and logging camps for about two months, and we have not up to present time been able to resume operations to full capacity the same as before the strike.
>
> Should you, however, wish to commence loading, you may do so, providing you waive all claim for demurrage. *We agree to furnish you lumber as fast as we possibily can.*"
>
> Respondent's Exhibit "A-4".

On October 16, 1917, the mill notified the captain as follows:

> "'In reference to the loading of your vessel now at our wharf, it is agreeable with us you commence

loading now or at any time your vessel is ready to receive cargo, and *we will furnish the cargo just as rapidly as* POSSIBLE UNDER EXISTING CONDITIONS. We will, however, on the completion of the loading of your vessel, insist upon a demurrage release and will dispute any claim you make for demurrage."

Respondent's Exhibit "A-5".

The captain answered on the same day:

"In answer to your letter of even date I wish to state that *I have orders from the owners in Seattle to await instructions from them before commencing to load.*"

Respondent's Exhibit "A-6".

On October 17 or 18, 1917, the captain advised as follows:

"The Puget Sound Mills and Timber Co.,
Port Angeles, Wash.
Gentlemen:
This is to notify you that the Schr. Levi W. Ostrander will be ready to receive cargo today at 1 P. M. *I also* AGREE UNDER EXISTING CONDITIONS *to sign a demurrage release to your mill upon completion of cargo.*

C. Henningson,
Master."

Respondent's Exhibit "A-7".

There was, therefore, a clear understanding between the respective agents of the parties to this suit that the beginning of loading on October 18th was not intended to set the laydays running against the charterer; that, on the contrary, the mill would not and could *not,* "under existing conditions," deliver the cargo "as vessel can receive it"; that the mill should

furnish the cargo as *rapidly as possible* "under existing conditions", and that, if the mill did so furnish the cargo, the master agreed, "under existing conditions", to waive any demurrage claim against the mill upon completion of the cargo.

The difficulty of finding a fixed day on which the laydays would begin under this charter-party is well illustrated by the efforts of the lower court in this direction.

In the "decision" the court says:

> "The undertaking on the part of the charterer to furnish cargo *from this day* becomes an absolute undertaking" (441).

In an effort to determine to what day "this day" refers, we meet with numerous dates mentioned in the part of the opinion immediately preceding this conclusion; but we are unable to determine to which of these dates the conclusion is intended to apply. From the fact that the decree made by the court awards demurrage for the period between October 15, 1917, and December 14, 1917 (447), no intelligent inference can be drawn. Nor could an inference be drawn from the previous conclusion of the court that

> "It appears conclusively established that on October 16th respondents began to furnish cargo to libelant" (440).

Appellee will probably attack this finding with as much vigor as we are inclined to devote to it; for it cannot be denied that all the evidence shows clearly and conclusively, that the mill did *not* begin to load until October 18th.

The inability of the lower court to determine on and from what exact day the charterer should be charged with laydays running against him is the perfectly natural result of the fact that, under the charter-agreement, it was provided that there should be *no exact day.*

2. The agreement between the mill and the captain that the loading should be accomplished in a reasonable number of days, beginning with October 18th, accords with the charter-party agreement.

1. *The agreement was a "Reasonable-time charter-party".*

(1) On May 15, 1917, when the charter-party was made, the vessel was building in appellee's shipyard. No agreement was made as to when she should be completed, or when she should proceed to her loading place or when she should be loaded. On May 23d appellee wrote to appellant: "According to present calculations the schooner *should be* ready for cargo about the middle of July"; on June 28th he writes: "She is *expected to be launched* between the 10th and 20th of July"; on August 13th he wires: "*Will be* ready for cargo by August twenty-fifth." Under such conditions of uncertainty the charterer would naturally be disinclined to bind himself to have his cargo ready, or to make himself liable for demurrage, upon the lapse of any definite time. He would naturally prefer to leave the beginning and duration of laydays undetermined, and dependent upon his reasonable conduct under all the uncertain circumstaces that might develop before the new vessel should be in condition to take her cargo on board.

(2) To meet this situation, the parties struck out of their charter-party the clause in ordinary use whenever a contract to load in a fixed time is intended. This deleted clause reads as follows:

> "The party of the second part shall be allowed for loading and discharging said vessel at the respective ports aforesaid laydays as follows,..... feet board.....measure per working day for loading, *to commence* twenty-four hours after vessel is at loading place designated by charterers or their agents, her inward cargo and/or unnecessary ballast discharged, *and she is ready to receive cargo* and Captain has notified them in writing to that effect."

By striking out this clause, the parties eliminated any express agreement as to, *first,* when loading should commence, and *second,* at what rate it should proceed; they made expressly, out of a form of charter-party designed to prescribe a fixed time for loading, a charter-party omitting intentionally any express agreement as to when the loading of the cargo should commence, and how many days the charterer should have for the purpose.

2. *Legal effect of charter-party as to charterer's duty.*

The legal effect of such a charter-party is defined by *Carver, Carriage by Sea,* Sec. 610, as follows:

> "And again, the time is often *left wholly undefined,* the charter being silent about it. In such case *the charterer undertakes no definite obligations in the matter;* but, as in other cases where the contract is silent, the law requires him to perform his part in the work with diligence."

And in Sec. 611:

> "* * * The question whether the charterer has been duly diligent *must be determined by reference to the conditions under which he has actually worked.*"

And in Sec. 615:

> "The contract implied by law in those circumstances is that the merchant and shipowner shall each use reasonable despatch in performing his part." * * * "The true view is, that the despatch required from the parties is that *which can reasonably be expected from them under the actual circumstances* which exist at the time of performance."

This statement of the law is supported by the English authorities.

The law is the same in the United States:

In *Empire Transp. Co. v. Philadelphia Co.* 77 Fed. 919, the Circuit Court of Appeals for the Eighth Circuit held:

(1) Where the charter is silent as to the time of unloading, there is an implied contract to discharge the vessel within a reasonable time.

(2) This contract is, in effect, an agreement to discharge her with reasonable diligence; that is, in such time as *is reasonable under all the existing circumstances, ordinary* AND EXTRAORDINARY, which legitimately bear upon that question at the time of her discharge.

(3) The burden is on him who seeks to recover damages for the delay of a vessel, under such a contract, to prove that the charterer did not exercise

reasonable diligence to discharge her under the actual circumstances of the particular case; but proof that the vessel was delayed in unloading beyond the customary time for discharging such cargoes at the port of her delivery throws upon the charterer the burden of excusing the delay by proof of the actual circumstances of the delivery and his diligence thereunder.

These principles, in their nature, apply with equal force to the charterer's duty of *loading* a vessel.

In *The Richland Queen*, 254 Fed. 668, the Circuit Court of Appeals for the Second Circuit held:

(1) Under a dry dock company's contract to repair a vessel, where no time was specified, the repairs are to be made within a reasonable time; and where a *strike* occurred among the operatives of the dock company, which delayed the work, the question is, *whether the delay is reasonable or not, in view of the circumstances at the time the contract was being performed.*

(2) Where, after a dry dock company had contracted to repair a vessel, its employees demanded shorter working hours, and struck because their demand was refused, *this was an excuse for delay in completing the repairs,* although the strike was not accompanied by violence, the delay being reasonable in view of the strike, and there being no difference in principle between peaceable and violent strikes.

No distinction can be made, as to the ruling principles, between a contract to repair a vessel, as in the case of the "Richland Queen", and a contract to furnish cargo to a vessel. In the case at bar, as in the

case cited, a strike occurred among the operatives who were to supply the cargo, and the work of dispatching the vessel was delayed in consequence of that strike. The question is: Was the period of loading the vessel, between October 18th and November 24th, a reasonable period in view of this strike and the other conditions prevailing? Was this vessel, in view of these conditions, loaded by the mill with reasonable diligence? The question is *not,* how quickly the cargo could have been supplied under normal conditions. The finding of the District Court, that "the vessel could readily have been loaded in fourteen days" is predicated upon the assumption of normal conditions; hence its application to the facts of this case under a "reasonable time charter" is erroneous.

3. *The duty of reasonable diligence governs appellant in furnishing the cargo.*

a. Beginning of Laydays Was Agreed to Be a Day Reasonable Under All the Circumstances.

This question applies, in the instant case, not merely to the duty of *loading* a ready cargo, but also to the duty of getting the cargo ready. It was so specially agreed between mill and master, after the latter knew that a full cargo was not ready and had appreciated the extraordinary nature of "existing conditions". When the charter was signed, the owner of the vessel knew that the cargo was not in existence; that the charterer was not the manufacturer of the cargo, but would have to acquire it from one of the sawmills on Puget Sound. On the other hand, the charterer could not foretell when the vessel, then building, could be

at her loading place, ready for the voyage. Therefore, the contract did not provide that appellants would furnish the cargo as soon as the vessel was constructed and completed, nor was any express time stipulated in the charter-party, at which appellants must have the cargo ready at the loading place. On the contrary, the deletion from the charter-party of the clause ordinarily used for this very purpose evidences the positive intention not to fix the time. Hence the principle applies that it was the duty of appellants to have the cargo ready for the vessel within a time reasonable under the circumstances, taking into consideration the circumstances as they actually existed. If there had been a strike at appellee's shipyard, the construction of his vessel might have been delayed until November or December, and appellants' corresponding duty to have the cargo ready would not have existed until then. As the vessel was not ready at the loading place until October 18th, the question is, whether the time when, and the rate at which, appellants furnished the cargo were reasonable, considering the strikes that had arisen, after the making of the contract, in the lumber camps, the sawmills and loading places before this vessel was finished, and considering the effects of these strikes, also considering the war conditions, the consequent enforcement of government control of the lumber industry on Puget Sound, and all the other circumstances surrounding the vessel and the mill. Not merely the period allowed for laydays, but also *the time when the loading should commence* are stricken out of the charter-party. The result is that the *day* when time should commence to run as a charge against appellants, and

consequently the day when the cargo was to be ready for loading, are not fixed, but are agreed to be dependent upon all the surrounding circumstances.

This contention is consistent with the principle that, in an ordinary charter-party, the charterer has an absolute duty to have the cargo ready whenever the vessel is ready; for in such a charter-party the beginning of the laydays is fixed with reference to or made dependent upon the readiness of the vessel to receive cargo. In the charter-party in suit, however, the provision that the laydays begin 24 hours after the vessel is ready is intentionally deleted, the effect being that the beginning of the laydays is not made dependent upon the uncertainty of the completion and readiness of a vessel then building, but is agreed to be a time reasonable under all circumstances. The charterer's duty was to have the cargo ready within a period of time which, under all the circumstances developing after the making of the charter-party, would be considered reasonable, and to load it accordingly.

The captain's agreement with the mill, waiving demurrage under the circumstances, was in strict accord with the agreement made by his owner in the charter-party.

b. Appellee's Knowledge That Cargo Was to Be Provided From a Particular Source and Therefore Subject to Delays by Which the Procuring of the Cargo From That Place Might Be Delayed.

That appellants were entitled to a reasonable time

for the purpose of providing the cargo follows also from the following considerations:

The charter-party provided, in effect, that the lumber cargo was to be provided by the charterer from the Puget Sound Mills & Timber Company at Port Angeles. The shipowner knew that the cargo was to be sawn by the mill, and that, before sawn, logs must be procured and sent from lumber camps, and that the procuring of a cargo of sawn lumber might be delayed by industrial troubles interfering with the cutting and sending of the logs, and their sawing in the mill, especially in view of the disturbed conditions normally incident to war, and of the uncertainty as to the time of completion of a vessel not yet built. The parties to this contract, on account of war recently declared between this country and the Central Powers, could reasonably foresee what in fact happened, viz.: that the war needs of the nation would cause a general commandeering, by the Government, of the resources of the lumber industry, of the plants of the lumber mills, and in particular of the supply and production of the Puget Sound Mills & Timber Company and its sawmill. They could also foresee that a ship in course of construction might be delayed in its construction by the extraordinary conditions introduced by a state of war, or might, when completed, be used by the Government for its paramount necessities. It was, therefore, as much for the interest of the shipowner as it was for the interest of the charterer, that the time when the vessel should be ready for the cargo, and the cargo ready for the vessel, should be left open in their con-

tract, and dependent upon the reasonable diligence of the parties in the uncertain conditions. The principle applies, which is stated by *Carver* as follows:

> "The charterer cannot be assumed to have the cargo ready, if it is expressly to be provided *from a particular place* and the charter has been made in view of circumstances by which, as the parties know, the procuring of a cargo from the place may be delayed * * *. This principle has been extended to cases in which delay has arisen, not from causes existing at the time of the contract, but from causes which it was known *might arise*" (*Carver, Carriage by Sea,* Sec. 254).
>
> "If, in such a case, *no arrangement is made as to the time* in which the loading is to be done, the charter will be allowed a *reasonable time for geting the cargo,* having regard to the known sources of delay."

In the case of *Jones Limited v. Green & Co.*, 9 Asp. 600 (Court of Appeal), Vaughn, L. J., said:

> "It is a case in which *the source from which the* (sawn lumber) *was to come was expressly defined.* When that is so, I think it is impossible to lay down an absolute rule that the charterer undertakes an unqualified obligation to have the cargo ready whenever it may be reasonably expected that there may be a berth for the ship * * *. It may be so sometimes, but it is impossible to say that it must be so * * *. I take it that one cannot exclude the knowledge of the parties in the consideration of this matter, because, after all, what we have to consider here is, *what was a reasonable time either for the provision of the cargo or for the commencement of the loading.*"

E. The District Court was therefore in error when it found that "It was the duty of respondents to furnish cargo as fast as it could be loaded, unless excused by the cesser clause, which clause does not excuse in this case".

The reference to the Cesser Clause in this connection is perplexing. We did not invoke its protection at any time or in any manner. We admit that it could not excuse appellants from furnishing the cargo in the manner or at the rate agreed by the charter-party. But we have shown that it was not the duty of appellants, under its contract, "to furnish the cargo as fast as it could be loaded". Their duty was to use reasonable diligence in providing the cargo under all the existing conditions. In order to determine, whether the acts of appellants in this respect were reasonable, all the circumstances surrounding the mill of the Puget Sound Mills & Timber Company, in October and November, 1917, must be given consideration.

We do not think appellee's proof sufficient to justify the finding of the court that this new and untried schooner could have been loaded in fourteen days, but appreciate that, under the rule of this court, we cannot be reasonably successful in overcoming this finding. The evidence shows, however, by clear preponderance, that any delay in the loading is excused by the actual circumstances surrounding the loading mill, and that appellants and their agents were reasonably diligent.

F. Appellants did in fact fulfill their obligations under the charter.

The principal obstacle to a more prompt loading of the vessel were:

(1) The effect of a general strike in the logging camps and lumber mills on Puget Sound,

(2) The requirements and orders of the U. S. Government in consequence of war needs.

1. The strike in the logging camps and lumber mills.

The evidence shows that the labor troubles at the lumber camps and mills of the Puget Sound district were the most serious in the history of the Northwest (testimony of Major Griggs, 277, 280-281, 284, 286, 287; of A. H. Landrun, 288, 289, 290; John Nearborne, 294, 296; Lee Dowd, 297; G. C. Thompson, 300, 301). Robert P. Allen, secretary and manager of the West Coast Lumberman's Association, *called by appellee as a witness,* testified that, as a result of the strike, the production of lumber dropped and "has never been normal since that time, or approximately normal" (340-341). The condition in the mill which loaded the cargo in the instant case is shown by the testimony of A. A. Scott, its general manager:

> "The COURT. You did not operate the mills from July to September?"
>
> "The WITNESS. We did not operate them" (183).
>
> "When the mill reopened on September 6th, it operated 'about 25% of its normal capacity'" (184).
>
> "We gradually brought up the production, possibly in 10 days afterward we were up to 30%, and kept on bringing it up until along in November, the latter part of November and the first of December we were, probably, up to 100% production" (184).
>
> "We never got back to the normal capacity of the mill" (204).

"Very few of our old men came back, and we had to break in new men, green hands, and we could not get efficiency out of these men" (184).

"Q. And what was the effect on the logging camps, of that strike?"

"A. It stopped the production of logs for a period of about eight weeks. We were then able to start what we call one side in our camp. Normally we operate six sides" (184).

"From July 16th until September 6th they were closed down. They did not haul a log" (198).

When the abnormal conditions at the loading mill became apparent, appellants made an effort to meet appellee's wish to cancel the charter by seeking a release from their contractual obligations to the South African buyers of the cargo; but the latter refused to release them, and they became absolutely bound to deliver the cargo out of this vessel. They thereupon used all reasonable endeavors to dispatch the vessel.

On October 18th, at 1:00 P. M., appellants and the mill were entitled to the benefit of a reasonable time for loading, under the circumstances existing at the mill. The general strike in the logging camps and lumber mills of Puget Sound, disclosed by the evidence, commenced on July 16th, and its effects were felt in the mill at Port Angeles for the rest of the year. From July 16th to September 6th the logging camps supplying the cargo of the vessel, and the mill, were entirely closed down. "They did not haul a log". After September 6th the men commenced to come back gradually, but the mill did not acquire approximately normal efficiency until the end of November. The efficiency of a sawmill is seriously impaired by the absence of a

single sawyer. The strike affected the furnishing of the cargo, on account of the crippled condition of the mill, while the loading of the vessel was going on. The District Court found that "the strike did not materially interfere with the output of the mills on Puget Sound after the first week in Sepember". This finding, we think, is not supported by the evidence; but at any rate it does not preclude this court, under its familiar rule respecting findings of fact, from finding that the strike did materially interfere with the output of the particular mill at Port Angeles which is involved in the instant case. The evidence shows clearly that the crippled condition of the mill at Port Angeles, resulting from the strike and aggravated by the war requirements of the government, was the cause of the delay in loading, in spite of all efforts to overcome the handicap.

The loading of the lumber on appellee's vessel was not in any way delayed by reason of the loading of other vessels arriving at the wharf of the Puget Sound Mill and Timber Company (185), nor did the cutting of cargoes for other vessels interfere with or delay the cutting of the cargo for the "Levi W. Ostrander" (186). The "Ostrander" was loading export lumber, while "the other vessels were loading coastwise California lumber—an entirely different grade" (193).

2. Commandeering of mill by Government.

An important element to be considered in determining the question, whether appellants and the mill used reasonable diligence in loading the vessel is the order

of the United States Government, received on September 7th, which interfered with the normal conditions of cutting and loading, and produced delay in furnishing the cargo to the vessel.

> "We received a telegram from the Secretary of War on September 7th, practically commandeering the mill; ordering to cut spruce immediately, and to notify him that day and to start cutting spruce and continue to do so for airplane purposes * * *. We could not cut fir logs for the 'Ostrander' if we were obliged to cut spruce logs for the government" (195).

The mill was

> "practically commandeered * * *. It lasted until the armistice was signed. Our mill was in charge of soldiers in 1918 entirely. * * * We were commandeered by the Secretary of War and by General Diske, by the Fir Production Board" (217).

The manager of the mill testified that the mill *did all they could,* under the circumstances, to furnish the cargo promptly.

> "We gave the vessel all the lumber we could possibly cut under our capacity.
>
> "Q. What was your interest in that regard or the mill's interest?
>
> "A. To get rid of the vessel and *give her the best possible dispatch we can;* the quicker we can get them away from the dock, the better off we are" (192).

The evidence thus shows positively that appellants and the loading mill complied with their duty to furnish the cargo with reasonable diligence and to consume no more than a reasonable time in the work of doing so. It is proper to keep in mind that in this

case appellants' and their agents' duty coincided with their self-interest, which was to deliver this cargo to its purchasers in South Africa as promptly as possible and thereby earn the profits of the sale. The evidence shows that appellants were as anxious as appellee to avoid delay and that they used every reasonable effort to complete the transaction.

II. ASSUMING THAT THE CHARTER IMPOSED UPON APPELLANTS THE DUTY TO FURNISH CARGO AS FAST AS VESSEL COULD RECEIVE IT, THIS DUTY IS SUBJECT TO THE EXCEPTIONS OF THE CHARTER-PARTY.

We are not attempting to get away from the principle that, under this charter-party, the undertaking of the appellants to furnish a cargo was as absolute as the undertaking of the appellee to furnish the ship after she was constructed.

We contend, however, that under this charter-party —no time being fixed when appellee was to furnish the ship and appellants were to furnish the cargo—the future *time* when ship and cargo should meet so that the "laydays" provided in the charter-party should begin to run was made dependent upon the circumstances surrounding both parties, and was subject to the exceptions of the charter-party. Admitting that the vessel must be constructed and tendered, *absolutely, within a reasonable time after the date of the charter-party contract;* and that reciprocally trees must be cut in the forest, transported to the mill, and made into

the sawn lumber to constitute the cargo, *absolutely, within a reasonable time after the date of the charter-contract;* we nevertheless contend that the intention of the parties to this charter-party was that, in case the ship was ready for the cargo on a particular day when the cargo was not yet ready, or in case the cargo was ready for the ship on a particular day when the ship was not yet ready, the delinquent party should be relieved from liability for damages if his unreadiness was caused by strikes, or hindrances beyond the control of either party to the agreement. The duty to furnish the ship, or the cargo, respectively, was absolute; but the *time* when these respective duties were to be performed was relative and to be determined in the light of the agreed exceptions.

These exceptions: "*Strikes,* lockouts, accidents on railways and/or docks and/or wharves, or *any other hindrances beyond the control* of either party to this agreement or their agents", are "*always* mutually excepted" and control all the obligations of either party to the agreement, among others the obligation of the charterer,

> "to *furnish* to said vessel, at designated loading place, a full cargo of sawn-lumber and/or timber".

To "furnish" means to provide, to supply, to procure; to look out for in advance; to procure beforehand; to get, collect or make ready for future use; to prepare.

Cook v. State, 46 S. E. 64, 65;
Ware v. Gay, 28 Mass. 106, 109.

The procuring and preparing of this cargo includes the cutting of the logs in the forest, transporting them from the logging camps to the mill, sawing the logs in the mill and then delivering the sawn lumber to the ship. These acts appellants engaged to do absolutely within a reasonable time, but they undertook to furnish the sawn lumber to the ship at any particular time only subject to the protection of the strike, hindrance and other exceptions. These are "*always* mutually excepted".

The "*freighting*" of the vessel is agreed to be subject to the exceptions which operate in favor of either party from the time when the contract is made and cover every obligation which either party assumes. If the owner of the vessel is, by *strikes* or "any hindrances beyond control", prevented from performing any of his obligations, he is excused; reciprocally the charterer is excused, if any of these exceptions prevent performance of his obligations. Both parties understand from the start that this cargo is not one which can be supplied in the open market on short notice, but that the charterer must procure it from the lumber merchant who specially prepares it for the special voyage. Both parties understand that an export cargo of Douglas fir lumber of agreed specifications, for the South African trade, must be first procured from and prepared by the sawmill from which the charterer has ordered it.

The obligation of appellants was to furnish this cargo, with the proviso that if, at the time when the vessel should report ready, the cargo was unprepared

by reason of *strikes,* any other *hindrances* beyond their control, or any of the other exceptions, the charterers should not be liable for the delay. Had the cargo been prevented from being ready for loading by "*accidents on railways*" connecting the logging camps with the mill, appellants would certainly not have been liable for the delay. Many contingencies may arise between the cutting of the trees in the forest and the loading into the vessel of the lumber sawn out of the trees; it is, therefore, natural that the charterer would protect himself by exceptive clauses against such contingencies.

The principle governing the ordinary contract of charter, imposing upon charterer the absolute duty to furnish the stipulated cargo whenever the ship reports ready, is predicated upon express agreements found in such a contract. Necessarily, in cases where the charterer agrees to load the cargo *whenever the ship shall be ready to receive it,* the *providing* of the cargo is not a charter obligation and is therefore not subject to the charter exceptions. *But the instant case is different.* The charterer, mindful of the contingencies above mentioned, does not agree to load the ship whenever she is ready or at any fixed time.

The case falls within the class of those where the scope of the exceptions apply "to the work of bringing the goods from the places at which they are produced to the spot at which the actual loading is done" (*Carver*, sec. 257a).

The strike in the lumber camps and sawmills about Puget Sound was also a "hindrance" within the scope

of that term in the exception clause. Another hindrance beyond charterer's control was the commandeering of the loading mill; for unless a distinction could be drawn between "*any* other hindrances beyond the control of either party" and "any other hindrances of *what kind soever* beyond their control", the case of *Larsen v. Sylvester,* 11 Asp. 78 (House of Lords), decides that the word cannot be restricted to hindrances *ejusdem generis* with the words previously enumerated. Hence the "commandeering" of the mill must be considered as one of the elements determining the question, whether appellant has fulfilled the assumed relative obligation to deliver the cargo as fast as vessel could receive it.

To summarize, the clause of the charter-party, providing for the obligation of the charterer to "furnish" a cargo to the vessel, is part of the contract whereby the owner "agrees on the freighting", subject to contingencies "always mutually excepted". Where, as here, strikes beyond the control of either party, and other hindrances beyond their control, such as the overpowering necessities of the government, caused a delay in the dispatching of the vessel, in spite of the reasonable diligence exercised by appellants to prevent or minimize the delay, appellants are relieved from liability.

III. THE CAPTAIN'S RELEASE IS BINDING UPON APPELLEE AND CONSTITUTES A DEFENSE TO APPELLEE'S CLAIM FOR DEMURRAGE.

On October 15th the mill company delivered to the captain of the vessel a letter saying:

> "We will, however, on the completion of the loading of your vessel, insist upon a demurrage release, and will dispute any claim you make for demurrage."

On October 18th the captain delivered to the mill company a letter saying:

> "This is to notify you that the Sch. 'Levi W. Ostrander' will be ready to receive cargo to-day at 1 p. m. I also *agree under existing conditions to sign a demurrage release to your mill upon completion of cargo.*"

On the same day the captain wrote to appellee:

> "According to instructions in your telegram received last night I again tendered a notice to the Puget Sound Mills and Timber Company stating that the Sch. 'Levi W. Ostrander' was ready to receive lumber, and that *upon completion of the cargo I would sign a demurrage release for account of the mill under existing conditions* * * *."

With this understanding the loading commenced. At this time appellee and his captain were in close communication with one another, and it is clear that the captain's agreements were binding upon appellee. At any rate appellee knew on October 18th, or the day following, that his master had agreed to sign a demurrage release upon completion of the cargo; if he had desired to repudiate such an agreement, he would have given prompt notice of such desire to appellants; the fact that he gave no such notice shows that the captain acted with full authority from appellee who practically stood at his captain's elbow during this period. Both appellee and his captain then recognized that the agreement with appellants required the latter to

furnish the cargo as promptly as the conditions then existing permitted under the assumption of reasonable diligence on the part of appellants, but that the "existing conditions" were not such as to make appellants liable for the delay in furnishing and loading the cargo. The agreement to release appellants had force not merely as a discharge of appellee's claim, but also as an *admission by conduct* that the charter-agreement was not intended to impose upon appellants an absolute duty to furnish the full cargo whenever appellee's vessel should be constructed and should report ready for loading.

IV. THE DEMURRAGE CLAUSE IN THE CHARTER-PARTY DOES NOT APPLY TO LOADING, AND THEREFORE, APPELLEE HAS NO CLAIM FOR DEMURRAGE.

The only clauses in the charter-party touching upon the subject of demurrage were the following:

> "Cargo to be received at port of discharge as fast as vessel can deliver at such wharf, dock or place as charterer or their agents shall designate.
>
> For each and every day's detention by default of said party of the second part, or their agents, two hundred and fifty dollars ($250) per day shall be paid * * *" (13).

As all provisions for the beginning and duration of laydays at the port of loading are struck out of the charter-party, and as, consequently, no demurrage at the loading place is contemplated, the agreed $250.00 per day can apply only to detention at the port of discharge.

Such a construction is reasonable in the light of the circumstances of this case. The uncertainty as to the time when the prospective vessel would be ready for the charterers' use in carrying their cargo to South Africa, and the uncertainty as to the time when this newly built vessel would satisfy the requirements of the Marine Surveyor, would naturally induce the charterers to refrain from binding themselves to pay demurrage at a fixed rate per day beginning at any fixed time.

V. THE DELAY IN LOADING WAS NOT CAUSED BY DEFAULT OF APPELLANTS OR THEIR AGENTS.

By the terms of this charter-party it is only for "detention *by default of*" appellants or their agents that they agree to pay the amount specified for each day in the charter (13). A detention caused, not by any act, or default of the charterers, but wholly by extraordinary war conditions, such as the commandeering of the sawmill by the Government, and by general strikes, directly affecting the supply and operation of the loading mill, and which made the prompter furnishing of the cargo impossible, cannot be considered as caused by "default" of appellants, in any just sense.

Appellee has the burden of proving appellants' default.

In this case the delivery of the cargo to the ship was retarded by the direct and immediate vis-major of the government, the commandeering of the mill for

war purposes, and by the nefarious activities of lawless bodies causing discontent and strikes in labor ranks. This was not a "default" within the meaning of the charter-party. The action of the government was a "superior force, acting directly upon the loading of the cargo"; "a direct and immediate vis-major", and the ruinous strike prevailing, with its after-effects, was an interruption "not occurring through the connivance or fault of the charterers", within the definitions of the terms in the case of *Crossmann v. Burrill*, 179 U. S. 100, 113.

Hence the detention between October 18th and November 24th was not caused by default of appellants, and did not render them responsible for demurrage under this charter-party.

THIRD: APPELLEE IS NOT ENTITLED TO DEMURRAGE FOR ANY PERIOD AFTER NOVEMBER 24th, WHEN THE SCHOONER COMPLETED HER LOADING.

Appellee's claim, as applied to the period after loading, is stated in Article V of the libel as follows (7):

> First: "That by the terms of said charter-party libelant *was given a lien on said cargo* for all demurrage accruing to the libelant under the terms of said charter-party, and is entitled to a lien thereon for any other or further demurrage sustained by libelant by the further detention of said vessel by the fault of said respondents".
>
> Second: "That *by the refusal on the part of said respondents to pay said demurrage* said vessel has already been detained five additional days, and libelants claim and demand of said respondents

and as against said cargo additional demurrage therefore in the sum of twelve hundred and fifty dollars ($1250.00) and a like amount of two hundred and fifty dollars ($250.00) per day for each day's detention from and after this date".

It should always be kept in mind that, to make appellants liable, appellee must show that his vessel was detained by their "default".

Instead of showing that the vessel was *detained by the default of appellants,* appellee offers to show that she was detained by appellants' refusal to pay a claim urged by appellee against them. We are at once met with the puzzling question: How could a refusal on the part of A to pay an alleged claim to B be a default, on the part of A, such as to be considered the legal cause of the detention of B's ship? How can the movements of B's ship be affected by any claim which B may have against A?

There are numerous grounds, on which appellees claim to any demurrage after November 24th must fail, and, in addition to these grounds, there are special grounds on which the claim for the period after November 30th must fail. We shall now discuss these separately.

I. AS TO THE WHOLE PERIOD FROM NOVEMBER 24th TO DECEMBER 14th.

With respect to this period we contend:

A. That the detention of the vessel was caused by no default of appellants or their agents.

B. Even if appellants' default had been one of the causes, appellants would not be liable for demurrage, because appellee's act was one of the causes.

A. No default on the part of the appellants caused any detention.

1. The cause of this detention was not that alleged in the libel.

The libel claims for five days' detention and states the cause of the detention of the ship to be "the *refusal* on the part of said respondent *to pay* said demurrage" (meaning $19,000 claimed for alleged detention during loading). Appellee had then full possession of his ship, had his own master on board, and further had on board the amplest security for the payment of any claim that he could prove to be just. Appellants had no legal means of preventing the exercise of appellee's full control over his ship, and did not use or attempt to use any means whereby the free departure of the vessel was hindered or delayed. It would be difficult to understand how, in the very nature of things, appellants *could* have stopped a ship by the passive method of refusing to pay $19,000 to the owner; but it is certain that they did not in fact detain the ship by this or any other method.

2. The cause of this detention was not that claimed by proctor at trial.

On the trial of the cause proctor for appellee, referring to his claim for demurrage after November 24th, and to the detention of the vessel by the War Trade Board, stated:

> "As a matter of fact, I think the only thing that could be said was that we did not get the boat away in time, and that was the reason we were held, *but we have not made any claim for that delay. Our claim for delay consists of five days after November 24th,* which five days was *consumed in this debate about the freight and the bill of lading, but we are making no claim for the subsequent time that the Government would not allow us to proceed*" (146).

The following deductions are inevitable from this statement:

First: That appellee admitted that he had no claim beyond the five days.

Second: That if he ever had any such claim, he waived it.

Third: That appellants had a right to rely upon such admission and waiver (abundantly supported by the allegations in the libel), and to forego any defense which they had to any larger claim.

Fourth: That the court could make no award for demurrage beyond the five days claimed.

However, the decree awards demurrage after November 24th for twenty days. The award of demurrage for fifteen days, amounting to $3750, is in conflict with counsel's admissions and waiver, both in the pleadings and at the trial, and therefore erroneous. This leaves a possible five days of demurrage after November 24th,

> "Which five days was consumed in this debate about the freight and bill of lading";

but even with reference to these days, the court is clearly in error. It is incumbent upon appellee to show

that, during these five days, the vessel was detained by the default of appellants. Counsel states that she was detained by a debate, meaning a controversy that had arisen between appellee and appellants. It is difficult to understand that this controversy could not have been carried on with perfect success without detaining the vessel. She was under appellee's individual possession and control; no one could detain her except one who took possession of her, and appellants did not interfere with her possession or free movements. Assuming, without admitting, that appellants' position in the "debate" was untenable, such assumed error caused no delay to the vessel. Even if it had done so, this would not be a "default" such as would make appellants liable for demurrage.

3. The cause of this detention was not that alleged in Court's Findings.

The District Court awarded twenty days' demurrage ($5000) for the period after loading, "because of the failure of the mill to promptly furnish specifications of cargo, and delay because of refusal of the master to sign bills of lading showing freight was paid, when in fact it was not paid, and delay caused by demand for waiver of demurrage" (445-446).

When this award was made, the court had evidently forgotten what it had said at the beginning of the "decision", viz.:

> "That libelant seeks to recover the further sum of $1250 for five days' additional detention of said vessel" (437).

Apart from other objections, the "Decision" shows on its face that the court awarded $3750 in excess of what the court decided that the libelant sought to recover.

As to the reasons given for the award, we submit that the evidence does not support its findings; but *assuming their correctness,* they are obviously insufficient to charge appellants with liability for this demurrage claim. First: An assumed failure of the mill to promptly furnish specification of cargo could not, and did not, cause a detention of the vessel. The vessel does not need such specifications to obtain her clearance; she could go freely on her way and leave the specifications behind. Second: An alleged delay because of an assumed "refusal of the master to sign bills of lading showing freight was paid, when in fact it was not paid", could not be construed as a "detention by default of" appellants; for how could the refusal of the master to sign a particular form of bill of lading presented by the shipper, after the cargo is on board, be effective as a cause of detention of the vessel? The Harter Act, Sec. 4, made it the master's duty to issue the bill of lading. When he performed this statutory duty, he could at once proceed on the voyage, and his refusal or neglect to perform this duty would not have been a default by appellants. Had appellants demanded improper bills of lading—which is denied—the master was at liberty to refuse to sign them, to issue his own form of bill of lading, and to depart with his vessel. None of these assumed acts

were, or could have been, the cause of the detention of the vessel.

Besides, appellee had no right to detain his vessel, at appellants expense, until the freight was paid; for the freight was not prepayable under the charter-party. Appellee was fully protected by his claim for the freight against appellants in personam, also by his lien on the cargo for the freight, and his marine insurance. Failure to prepay the freight, had there been any such, could not be the legal cause of the detention of the vessel.

Third: The third reason assigned by the District Judge for allowing this item of demurrage is "delay caused by demand for waiver of demurrage". This reason belongs to the same category as the others. Suppose it to be a fact that the agents for appellants did make a demand upon the captain for waiver of demurrage; and assume such demand to have been improper; how could such a demand be the cause of delay of the vessel? Was not the captain physically at liberty, if he so chose, to laugh at such a demand, to answer it by refusing to comply with it, and to go to sea with his vessel? Assuming that the mill demanded that the master carry out his agreement made on October 16th, and that he sign a demurrage release, he was nevertheless at liberty, physically speaking, to breach his agreement, as he in fact did; the demand of the mill did not interfere with the control of the vessel by appellee to depart with her cargo. Neither the charterer nor the demands of the mill

prevented her from sailing or were the cause of her detention.

4. The principal cause of this detention was the prohibition of the War Trade Board.

At the trial, appellee testified as follows:

> "Q. Now, when did the vessel finally get away?
> A. On the 26th of December.
> Q. *What was the cause of all the delay during December?*
> A. *She was held by the War Trade Board.*
> Q. For what reason?
> A. An embargo had been placed on lumber, and *they would not permit her to sail* in this trade.
> Q. *So that she could not have sailed before that time without license and permission of the United States Government?*
> A. *No; the Government held her*" (142-143).

Later, in answer to questions asked by his own counsel, libelant testified:

> "Q. When did the War Trade Board first announce a policy, or *put into effect* a policy, requiring licenses for boats to sail to South Africa, if you know?
> A. I think it was sometime in November.
> Q. Was it prior to November 24th?
> A. I believe so" * * * (145).

Appellee's own testimony shows, therefore, that, when his vessel was loaded on November 24th, he was required to obtain a sailing license from the United States Government; that he could not have sailed on November 25th or 26th, or at any time thereafter without this license; that he was not able to secure this license until December 26th; that he did sail after it was secured, and

that *this requirement* of the Government "was the cause of all the delay in December".

Had the license requirement been a new regulation becoming effective on December 1st, the delay in securing the requisite permission would account for the delay in December alone, but not for the delay between November 24th and December 1st; but as this requirement was effective on November 24th, it appears by appellee's own testimony that the fact of the vessel's being "held by the War Trade Board" was the effective and controlling cause of the whole delay of the vessel after she was loaded. Appellee's testimony therefore disproves the allegation in his libel, upon which his claim for demurrage after November 24th is based, "that by the refusal on the part of said respondents to pay said demurrage, said vessel has already been detained five additional days". The refusal was an inefficient incident, but not the *cause* of the delay. The cause was, that "the Government held her".

It is earnestly submitted that, apart from all other grounds, this disposes effectively of all appellee's claim for any demurrage after November 24th. The award of demurrage in the decree, from November 24th to December 14th (twenty days) is erroneous, for the reason that if appellee's testimony were the only evidence in the case, it would be sufficient to defeat his claim conclusively, for it demonstrates that the causa causans of the delay of the vessel after November 24th, was *not* any default of appellants.

5. Another cause was appellee's failure to secure a crew.

The master, in his deposition, testified as follows, (on December 4th, 1917):

"Q. Have you signed your crew?
A. Not yet.
Q. When are you going to sign it?
A. *When I get one.*
Q. You have been trying to get a crew?
A. Yes.
Q. Up to this time you have not been able to get one though?
A. Yes.
Q. When did you first try to get a crew?
A. Trying to get a crew—last month.
Q. Have you not been able to get it?
A. No.
* * * * * * *
Q. You have not a single man signed up?
A. I haven't any; I have a carpenter on board, that is all. * * * I have the men ready to go with me as soon as we get through with this here. * * *
Q. When did you get your crew?
A. We got them up here.
Q. I say, when?
A. *I got them within the last day or two"* (82).

It appears therefore, that up to December 2nd, the vessel was not supplied with a crew. It would have been impossible for her to sail for South Africa with only a captain and carpenter on board. This difficulty in obtaining a crew was one of the causes of the delay down to December 2nd, and when she was then physically able to sail, the War Trade Board prohibited her from sailing until December 26th.

6. A further cause was appellee's act in seizing the cargo.

On November 30th appellee filed the libel and seized appellants' cargo on board appellee's schooner.

Assuming that appellee had a lien on the cargo for his alleged claim, he had no right to enforce it in such a manner as to aggravate appellants' supposed damages. His duty was to mitigate them. If the suit caused a detention of the ship, such detention was not caused by default of appellants, but was caused by appellee's choice of remedy.

It would have been more reasonable for appellants to commence a libel proceeding against appellee's schooner for failing to proceed on her voyage and thus delaying the cargo, than it was for appellee to commence this libel proceeding against the cargo at the particular time, and to attempt to charge appellants with new damages for the detention of the ship.

Appellee could not have charged appellants for the additional damages resulting from his own act even if he had been justified in attaching appellants' cargo; *a fortiori* he has no claim if the seizure of the cargo was not justified in law.

We contend that appellee had no legal right to seize the cargo. His alleged right rests upon the allegation in the libel

> "That, by the terms of said charter-party, libelant *was given a lien on said cargo* for all demurrage accruing to the libelant under the terms of said charter-party."

The detention of the schooner to enforce this alleged claim was unjustifiable for these reasons:

A. The charter-party contains no provision for demurrage at the port of loading; hence appellee had no lien on the cargo.

B. Assuming that the charter-party contained a provision for demurrage at the port of loading, appellee's right to enforce the claim by this remedy was, at best, doubtful.

C. Assuming that appellee had an undoubted lien under the charter-party, it was his legal duty not to enforce it in a manner to cause additional loss to appellants.

A. We have shown that the agreed demurrage of $250 per day under the charter-party applies only to cases of detention by charterer at port of discharge, and not to an alleged case of detention at port of loading. Granting that detentions by default of the charterer at the port of loading would make the charterer liable for any damages caused by such default, even in the absence of charter provisions, still appellee has not shown what, if any, damages he suffered by such alleged detentions.

B. Assuming, however, that appellee had a claim for demurrage under the charter-party for any detention at the port of loading, his right to enforce such assumed claim by seizure of appellants' cargo was at best a doubtful right.

In the case of *Elvers v. Grace*, 244 Fed. 705, this court had before it a charter-party containing a cesser-

and-lien clause practically identical with the one in the instant case. The court *held,* that such clause confers no lien on the shipowner with respect to an antecedent liability of the charterers for demurrage in loading. The court cited with approval the following rule laid down by the Circuit Court of Appeals for the Fifth Circuit in *Schmidt v. Keyser,* 88 Fed. 799:

> "Where the charter-party provided that all liability on the part of the charterer should 'cease as soon as he shipped the cargo', * * * the clause applied only to liability accruing after the loading, and did not relieve the charterer from liability before the completion of loading."

The court then drew the conclusion that this clause

> "*Confers no lien on the shipowners with respect to the antecedent liability of the charterers*" (88 Fed. *709*).

If the appellee in this case had no lien upon appellants' cargo with respect to any assumed liability of appellants for demurrage at Port Angeles, his seizure of the cargo was wrongful, and the detention of his ship consequent upon such seizure was caused not only by his own act, but by his wrongful and unlawful act.

Even if it were assumed that appellee's lien on appellants' cargo was *doubtful,* and that his seizure and detention thereof were the exercise of a doubtful right, he was still not justified in exercising such a precarious right in view of the fact that adequate remedies were open to him protecting fully his assumed rights without causing additional damages to appel-

lants. Appellee had no right to charge appellants with the costs of a doubtful experiment. If demurrage had accrued in his favor, which is denied, it was his duty to minimize appellants' damages by minimizing the demurrage period. Instead of performing this duty, he chose to extend the demurrage period by unnecessarily causing further detention. Unfailing and adequate remedies, not involving the detention of his vessel, were open to him; he had his action against the charterers in personam; he had appellants' cargo in his possession and the right to keep it in his possession until the time when it would reach destination at South Africa, and possibly beyond that time, if that should become necessary for the protection of his interests. All this could have been done without causing additional damages to appellants.

C. Assuming that appellee had a good and perfect lien on the cargo when he seized it, which is denied, he, by seizing it and thereby causing further detention to his vessel, chose unnecessarily a remedy which aggravated appellants' damages. Apart from all other consideration, he should not be permitted to recover these damages, because they were caused by his own fault, and in disregard of his duty to minimize damages.

7. There was no "detention by default" of the appellants or their agents, after November 25.

Appellee sued appellants and their cargo for demurrage under the charter-party, at the rate provided therein, "for each and every day's detention by

default of such party of the second part, or their agents, two hundred and fifty dollars ($250) per day".

The meaning of this clause in a charter-party was construed by Judge Wolverton in *Washington Marine Co. v. Rainier Mill Lumber Co.,* 198 Fed. 142, where the court said:

> "The term 'default' employed in that relation in charter-parties signifies failure on the part of the charterers to do or perform some duty or act which they have stipulated or are bound in pursuance of their contracted relation to do or perform. The term cannot be so broadly interpreted as to include all manner of causes of detention or delay, whether arising from act or omission in the discharge of duty on the part of the charterers or not."

The obligation to pay demurrage under this charter was not an absolute one; the charterers are answerable only for detention which may result from their default, from their non-performance of a contract duty.

In the instant case the real cause of the detention after November 24th, was not the non-performance, by appellants, of any charter obligation. Accepting appellee's own allegation in the libel, it was "The refusal on the part of said respondents to pay said demurrage". The vessel was not detained by this; nor was she detained, after loading, by any of the matters alleged by proctor at the trial, or by the lower court in its "Decision". The real and only legal cause was the default of her owner and master, their failure to proceed on the voyage when the cargo was on board.

B. Assuming that appellants' refusal to pay demurrage was the cause of the detention of the vessel, and assuming that appellants were in the wrong in refusing to pay it; nevertheless appellee is not entitled to demurrage, as he, also, was at fault.

We have shown that a mere refusal to pay demurrage to the owner of a vessel cannot be the cause of the detention of his vessel. If, indeed, appellants had seized the vessel for undertaking to sail from Port Angeles without furnishing what they considered to be a proper bill of lading, we could understand appellee's position in using appellants' act as a basis for a demurrage claim.

Waiving, however, this obvious objection, and assuming, for the sake of argument, that appellants had in fact caused a detention of the vessel in consequence of a controversy which they had with appellee over the proper form of bill of lading, appellee would still not be entitled to demurrage if it appeared that he was also at fault in detaining his ship in port during the pendency of the controversy. We have shown that he was in the wrong in keeping his vessel in port in order to enforce a lien which he did not possess; apart from this, the presentation of bills of lading by the mill,—assuming them not to be true bills—did not justify his demurrage claim.

The case of *Hansen v. American Trading Co.,* 208 Fed. 884, is in point. It is there *held,* that demurrage is not recoverable for the detention of a vessel after she was loaded because of a dispute in respect to the bill of lading where both parties were in the wrong.

The case also shows that the Harter Act expressly imposes upon the master the duty of issuing a bill of lading which, of course, is to be a true bill; that if the bills presented to him by the charterer are not true bills, he is right in refusing to sign them, but is wrong in not tendering what he considers to be a true bill, and that, if such mutual fault leads to delays, the master cannot claim demurrage.

Assuming, then, that the mill presented an objectionable bill of lading, which the master properly refused to sign; how could such a fact be the cause of detention of the vessel, when the master has not only the liberty, but the statutory duty, to issue a true bill of lading? His failure to perform this duty was the cause of the detention of the vessel rather than the cause attributed by the District Court in awarding demurrage.

II. AS TO THE PERIOD FROM NOVEMBER 30th TO DECEMBER 14th.

With respect to this period, we contend:

A. That there was no default on the part of the appellants for each of the reasons stated under subdivision I.

B. That there was no default on the part of the appellants for the additional and special reason that demurrage for that period was expressly waived, at the trial, by proctor for appellee.

C. That appellee cannot recover, on a libel filed on November 30th, damages which may have occurred thereafter.

A.

The argument in subdivision I applies to this period, as well as to the period from November 24th to November 30th.

B.

At the examination of libelant's first witness, the proctor for libelant stated in open court (after having, to the best of our recollection, made the same statement in his opening remarks at the trial):

> "Our claim for delay consists of *five days after November 24th* * * * *but we are making no claim for the subsequent time*" (146)

The libel was filed at the end of these five days.

Relying upon this statement by counsel, no attempt was made by appellants, at the trial, to make a defense against any claim beyond the five days mentioned by counsel. We submit that appellants had a right to rely upon the admission and waiver made by counsel and to refrain from entering upon any defense covering the period after November 29th; and we submit that the award of demurrage for the fifteen days subsequent to November 29th, for which libelant was "making no claim" is not consonant with any principle of law or equity.

C.

The libel, filed on November 30, 1917, alleges:

> "Libelant demands * * * a like amount of two hundred and fifty dollars ($250) per day for each day's detention *from and after this date*" (8).

No amendment of the libel, or supplementary libel, was thereafter filed; on the contrary, libelant waived this demand at the trial in open court. The decree of the District Court awards to libelant demurrage for fifteen days under this allegation, making the sum of $3750.

Had libelant brought his action in a court of his own state, he could not recover damages claimed for a period subsequent to the institution of his action, the Supreme Court of Washington following a principle (which, in the absence of a statutory enactment, is the general rule of law), that, for a recovery of damages occurring after the time the action is brought, the plaintiff must amend his petition or file a supplementary petition.

> *International Development Co. v. Clemens,* 109 p. 1034.

In the instant case, no leave to file an amendment could have been granted after libelant, in open court, had explained the allegation of his libel as meaning that no claim was intended for the period after the libel was filed; and in fact, no leave to file an amendment was applied for nor an amendment filed. Libelant must stand on his pleadings and admissions. The issues tried in the District Court were confined to the period ending on November 29th. The award of the court *exceeds* by $3750 what appellee had contended for or had a right to contend for, and what appellants had no fair opportunity to meet in defense.

For the several reasons stated, the award of demurrage for the fifteen days' demurrage beginning with the day on which the libel was filed was clearly in error.

Synopsis of the Decisive Points.

The demurrage awarded was "for the period between October 15, 1917, and December 14, 1917", less deductions, making 45 days.

1. From this period, the period from October 15th to October 18th should be deducted, because: (a) the vessel was not ready to load until October 18th, on account of the order of the owner given to the master; and, (b) the agreed evidence of seaworthiness had not been furnished to charterers.

2. (a) During the period from October 18th, the day when loading commenced, to November 24th, when loading was completed, appellants and their agents delivered the cargo with a diligence reasonable under the existing conditions, and thereby performed their charter obligations. The conditions preventing a more expeditious loading were conditions growing out of the war, such as commandeering of the mill's resources, and the after-effects of a strike paralyzing the lumber industry.

(b) Before beginning the loading, the owner and the charterer of the vessel, recognizing the existing extraordinary conditions, made an express agreement,

by their agents, to waive demurrage under the circumstances.

3. (a) During the whole period from November 24th to December 14th, and in fact to December 26th, the vessel's owner was unable, on account of war regulations, to secure the permission of the War Trade Board to sail with her cargo. This was the efficient cause of her detention; no default of appellants caused or contributed to the detention.

(b) In addition to the foregoing reason, the special reasons, why the allowance of demurrage from November 29th to December 14th was error, are:

(1) It is contrary to the admissions of appellee;

(2) It is damages not in issue at the trial.

In addition to these salient and decisive points there are the other, minor and subordinate, but sufficient grounds, discussed in this brief, and showing that the District Court was in error in allowing any demurrage. The decree should therefore be reversed, with instructions to the lower court to dismiss the libel, with costs to appellants.

Dated, San Francisco,
March 25, 1920.

Respectfully submitted,

ANDROS & HENGSTLER,
LOUIS T. HENGSTLER,
Proctors for Appellants.